

Request for Reconsideration
10/800,518

5000-1-550

REMARKS

Reconsideration of the above identified application and allowance of all the pending claims are respectfully requested in view of the following remarks. No amendments have been made at this time. Claims 1, 6, 9-11, and 17-18 remain pending herein. Claims 2-5, 7-8, 12-16 and 19-22 were previously canceled without prejudice or disclaimer. Claims 1, 10 and 17 are independent claims.

Claims 1, 6, 9-11 and 17-18 stand rejected under 35 U.S.C. §103(a) as allegedly being obvious over Harel *et al.* (U.S. Pat. Appln. Pub. No. 2004/0190548) ("Harel") in view of Wang *et al.* (U.S. Pat. Appln. Pub. 2004/0052274) ("Wang"). Applicant respectfully traverses this ground of rejection for the reasons indicated herein below.

With regard to the rejection under 35 U.S.C. §103(a) over the combination of Harel and Wang, Applicant respectfully submits that none of the present claims would have been obvious to a person of ordinary skill in the art at the time of invention.

Applicant respectfully submits that the rejection under 35 U.S.C. §103(a) utilizes an impermissible degree of hindsight, using the present claims as a roadmap to construct a combination rejection that still does not disclose or render obvious not the construction of a GEM frame is recited claim 1, but the addition of the type of payload (control data frame, TDM data frame, Ethernet data frame) for processing the different types of GEM frames, so that the GEM frame in the GPON can be processed by the information provided through the header (as recited in claim 1).

Applicant is well-aware of MPEP 2145)X regarding the quotation of *In re McLaughlin* that "any judgement on obviousness is in a sense necessarily a reconstruction based on hindsight

Request for Reconsideration
10/800,518

5000-1-550

reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper" *In re McLaughlin* 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971); however, Applicant notes that in *KSR International v. Teleflex*, 127 S.Ct. 1727, 1744, 82 USPQ2d 1385 (2007)), the Supreme Court noted that: "[A] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning . "

Accordingly, Applicant respectfully submits that the knowledge was gleaned only from the Applicant's disclosure, and thus is improper and constitutes the *ex post* reasoning cautioned against by *KSR*. For example, with regard to the present claims, the combination of Harel and Wang, as a whole, fails to discuss the different types of GEM frames, and whereas Harel is silent about GEM, Wang merely discloses PONs in a process for using multiple channels for a single ONU to transmit at the same time, and thus a person of ordinary skill would not have found it obvious to generate a GEM frame structure in a g GPON as claimed.

Furthermore, as the Office Action, for example at page 3, with regard to the combination of Harel and Wang, alleges that Harel discloses providing a control frame delivering management control information, Applicant respectfully submits that claim 1 recites in part "receiving payload information of the GEM frame to provide a GEM control frame delivering management control information", and thus Harel (with or without Wang) clearly fails to disclose or render obvious the aforementioned recitation, and is thus at least one of several examples of the type of distortion by impermissible hindsight bias discussed above. Claims 10 and 17 make similar recitations that are improperly rejected upon similar rationale.

Request for Reconsideration
10/800,518

5000-1-550

For at least the above reasons, the combination of Harel and Wang clearly fails to disclose or render obvious independent claims 1, 10 and 17, as the rejection improperly distorts Applicant's claim language, and thus does not provide the proper *prima facie* case of obviousness required under 35 U.S.C. §103(a).

Moreover, Applicant respectfully submits that the combination of elements, as recited in the present claims, would not have been within the level of ordinary skill in the art (*KSR International v. Teleflex*, 127 S.Ct. 1727, 82 USPQ2d 1385 (2007)).

Reconsideration and withdrawal of this ground of rejection under 35 U.S.C. §103(a) are respectfully requested.

Applicant also respectfully submits that with regard to claims 6, 9, 11 and 18, all of these claims are patentable at least for dependency from one of independent claims 1, 10 or 17, which are believed to be patentable for the reasons disclosed above, and because of a separate basis for patentability. Individual consideration of all the claims on their own merits is respectfully requested.

Accordingly, Applicant respectfully submits that the rejection under 35 U.S.C. §103(a) is overcome.


For all the foregoing reasons, it is respectfully submitted that all of the present claims are patentable in view of the cited references. A Notice of Allowance is respectfully requested.

Request for Reconsideration
10/800,518

5000-1-550

Should the Examiner deem that there are any issues that may be best resolved by telephone communication, please contact Applicant's undersigned Attorney at the number listed below. While no fees are believed to be due at this time, please credit any overages or charge any deficiencies to Deposit Account 502-470.

Respectfully submitted,


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